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In the Supreme Court of the United States

October Term, 1977
No. 78-133

HELEN RUBY, et al.,
Petitioners,
vs.
ALBERT G. GILES, ADMINISTRATOR,
OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

PROPOSITION OF LAW:

OHIO'S POSITION THAT A "TOTAL SEPARATION" WITHIN THE MEANING OF 19 U.S.C. SECTION 2291 OCCURS "ON THE FIRST DAY ON WHICH THE EMPLOYEE NO LONGER PERFORMS SERVICES FOR THE EMPLOYER, WHETHER DUE TO A LAY-OFF OR FINAL TERMINATION" IS A PROPER STATUTORY INTERPRETATION OF THE FEDERAL STATUTE.

This petition centers upon the interpretation of a section of the Trade Act of 1974 that determines at what point in time a worker may become eligible for Trade Readjustment Allowances (TRA). The section, 19 U.S.C. Section 2291, provides:

> "Payment of a trade readjustment allowance shall be made to an adversely affected worker covered by a certification under subpart A of this part who files an application for such allowance for any week of unemployment which begins after the date specified in such certification pursuant to section 2273(a) of this title, if the following conditions are met:
>
> "(1) Such worker's last total or partial separation before his application under this part, occurred
>
> (A) on or before the date, as specified in the certification under which he is covered, on which total or partial separation began or threatened to begin in the adversely affected employment, and "* * *"

The Trade Act also defines the term "total separation" at 19 U.S.C. Section 2319(11):

> "The term "total separation" means the lay-off or severance of an individual from employment with a firm in which, or in a sub-division of which, adversely affected employment exists.

This petition results from the Ohio Supreme Court's refusal to grant a motion by petitioner that the Ohio Court of Appeals for Franklin County certify its record to that court. By so refusing the Ohio Supreme Court has found no case of public or general interest in the interpretation that the lower court has given to these two sections of federal law in light of the purpose of the Trade Act of 1974 and the regulations promulgated concerning the Act. The specific issue that is the focus of this petition is the question whether any or all of the petitioners were totally separated on or after the date certified by the Secretary of Labor as the "impact date", October 24, 1974.

The impact date is the earliest date on which separations from the business can be attributed to increased foreign competition. 19 U.S.C. Sections 2272-2273 (See Appendix) It should be emphasized that this date is not arbitrary, but rather, it is subject to review had petitioners chosen to challenge the Secretary's finding pursuant to 19 U.S.C. Section 2322 (See Appendix) which provides for review by the United States Court of Appeal in the district where petitioners are located if filed within sixty days of the certification of the impact date. Petitioners, however, have chosen not to challenge the impact date of October 24, 1974.

Petitioners have chosen to center upon the meaning which should be given to "total separation" as required by 19 U.S.C. Section 2291. Petitioners have consistently adhered to the proposition that "total separation" is the complete termination of the overall employment relationship. Their view is that a cessation of services such as a lay-off is not a "total separation" when it is followed later by the termination of employment benefits (e.g. health insurance). This situation, petitioners argue, demands that the date of the termination of these benefits be viewed as the date of the "total separation". It is respondent's position, however, that such a conclusion would create tremendous hardship in the administration of the TRA program and pose serious equal protection challenges to the TRA program.

The flaw that would emasculate TRA's effectiveness is that petitioner's argument would place workers who are indefinitely laid-off with their employment or "fringe" benefits ended at the same moment in a much different position than workers such as petitioners who are indefinitely laid-off but whose "fringe" benefits are allowed to continue for a longer period of time. Such disparity reveals not only the blatant equal protection problems which would arise, and should require no further comment, but would also present the Bureau of Employment Services, as the State agency responsible for the administration of the TRA program, with an unmanageable burden. No longer would the lay-off date have significance to whether the worker qualifies for the benefits, but rather, some date on which the employers-employee health insurance or life insurance program ends would become the critical factor. Requiring the Bureau to identify such possible dates would put additional, unnecessary paper work into a system that is designed to function by the use of a lay-off or severance date that is easily provided by the worker and conveniently verified by the employer.

The record cogently establishes that the petitioners herein were indefinitely laid-off from their employment. In fact, each petitioner so testified at the hearing held by the Referee of the Board of Review. And, it must be noted that petitioners have not challenged this finding of fact and therefore have removed the question whether they were laid-off from judicial review. The Trade Act of 1974 specifically states:

> A determination by a cooperating state agency with respect to entitlement to program benefits under an

> agreement is subject to review in the same manner and to the same extent as determinations under the applicable state law and only in that manner and to that extent. 19 U.S.C. 2311 (d)

In this regard, Ohio law mandates that factual questions are primarily within the province of the Referee and the Board of Review and a court may reverse only when these factual questions are answered in a manner contrary to law or against the manifest weight of the evidence. *Brown-Brockmeyer v. Roach,* 148 Ohio St. 511 (1947).

The unchallenged fact that petitioners have been, as the Referee has noted, "laid-off due to lack of work for an indefinite period of time" establishes conclusively that the court below has not erred in its finding that all but three of the petitioners were not eligible for TRA benefits. As already stated, the crucial question in this petition is the determination of the date of petitioner's "total separation." The Ohio Court of Appeals' opinion for the unanimous court below states unequivocally that "for purposes of computing benefits under the Trade Act of 1974, 'total separation' occurs on the first day on which the employee no longer performs services for the employer, whether due to a *lay-off* or final termination." (Emphasis added) *Ruby et al. v. Giles, et al.,* Court of Appeals of Franklin County, Ohio, November 3, 1977 at p. 3955.

As noted, the definition of "total separation" provided by the Act itself requires that petitioners be laid-off or severed from employment. Employment is defined by the regulations adopted by the Secretary of Labor pursuant to the Act (see Appendix 19 U.S.C. 2320) as "any service performed for an employer by an individual for wages or by an officer of a corporation." 29 C.F.R. Section 91.3 (15). Thus, in order to be employed one must be performing services of some sort for the employer. The court below has held accordingly: "For the purposes of this case, to

constitute last 'total separation,' there must have been severence of the employee from employment, which is defined as performing services for wages." (*Ruby, supra,* at p. 3954)

That the petitioners were not performing services for their employer after the dates indicated as their date of separation is beyond question. Petitioners have themselves so admitted in their petition for certiorari at p. 5 where they state "although Appellants *no longer performed services* for their employer after the above dates, and thus did not receive hourly wages after such dates, they still continued as employees for other purposes." (Emphasis added) The explanation given for these "other purposes" is that they continued to receive certain fringe benefits that were not discontinued until December 31, 1974. But, as the court below has correctly recognized from the Act, a worker has to be separated by reason of a lay-off or severance from employment, which has been defined as including the performance of services. Petitioners each were asked by the Referee of the Board of Review whether they performed any services after their dates of separation. To a person, each testified that she did not.

It is therefore quite evident that the court below has not erred in its decision that all but three of the petitioners have not qualified for TRA benefits. Further, the Court has provided a workable and reasoned interpretation of the Act's definition of "total separation", particularly the day on which it occurs. The court has stated at p. 3955:

> Under the applicable definitions, separation does not occur on the last day of employment, but, rather, necessarily occurs on the first day of unemployment. An employee cannot be considered severed from employment on a day on which he is fully employed. The severance, of necessity, occurs on the first day of unemployment, rather than the last day of employment.

With this interpretation, the Bureau of Employment Services can effectively administer the TRA program without the administrative burden that petitioner's argument would provide. The Bureau simply has to check to see the last day worked and then compare the next work day which follows that day with the impact date to see if the worker is eligible. The Ohio Court of Appeals did this, for example, with the three petitioners who were determined eligible in this appeal. Their separation date had been October 23, 1974 — the date of their indefinite lay-off. The next day they could have worked was October 24, 1974, which coincidently was the impact date. The Act requires that the last total separation occur on or after the impact date so in their case they qualified for the TRA benefits.

CONCLUSION

Respondents respectfully submit that this petition does not warrant review by this Court because the interpretation given to the federal statute by the Ohio Courts does not violate any norms of statutory construction, nor does it jeopardize the effectiveness and congressional purpose of the TRA program. This Court has long held that petitions involving statutory construction must be of major importance before certiorari will be granted. Various elements considered in whether the petition reaches the level of importance include whether the issue is significant in the administration of the statute, e.g. *United States v. Rujicka,* 329 U.S. 287 (1946) and whether the issue will seriously hinder the effective administration of the statute, e.g. *Rothensies v. Electric Battery Co.,* 329 U.S. 296 (1946). The interpretation that has been given to the contested statute does not hinder the administration of the TRA program but in fact increases its effectiveness by easing the burden of determining one's eligibility with

regard to the impact date. For these reasons, respondents urge that this petition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed to Michael N. Tousey, Segreti & Tousey Co., L.P.A., 19 East Livingstone Avenue, Columbus, Ohio 43215 on this the ..... day of August, 1978.

RICHARD A. SZILAGYI
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APPENDICES

19 U.S.C. Sections 2272, 2273

§ 2272. Group eligibility requirements

The Secretary shall certify a group of workers as eligible to apply for adjustment assistance under this part if he determines –

(1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

For purposes of paragraph (3), the term "contributed importantly" means a cause which is important but not necessarily more important than any other cause.

§ 2273. Determinations by Secretary of Labor – Certificate of eligibility

(a) As soon as possible after the date on which a petition is filed under section 2271 of this title, but in any event not later than 60 days after that date, the Secretary shall determine whether the petitioning group meets the requirements of section 2272 of this title and shall issue a certification of eligibility to apply for assistance under

this part covering workers in any group which meets such requirements. Each certification shall specify the date on which the total or partial separation began or threatened to begin.

Workers covered by certification

(b) A certification under this section shall not apply to any worker whose last total or partial separation from the firm or appropriate subdivision of the firm before his application under section 2291 of this title occurred –

(1) more than one year before the date of the petition on which such certification was granted, or

(2) more than 6 months before the effective date of this part.

Publication of determination in Federal Register

(c) Upon reaching his determination on a petition, the Secretary shall promptly publish a summary of the determination in the Federal Register together with his reasons for making such determination.

Termination of certification

(d) Whenever the Secretary determines, with respect to any certification of eligibility of the workers of a firm or subdivision of the firm, that total or partial separations from such firm or subdivision are no longer attributable to the conditions specified in section 2272 of this title, he shall terminate such certification and promptly have notice of such termination published in the Federal Register together with his reasons for making such determination. Such termination shall apply only with respect to total or partial separations occurring after the termination date specified by the Secretary.

§ 2320. Regulations

The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this part.

§ 2322. Judicial review

(a) A worker, group of workers, certified or recognized union, or an authorized representative of such worker or group, aggrieved by a final determination by the Secretary under the provisions of section 2273 of this title may, within 60 days after notice of such determination, file a petition for review of such determination with the United States court of appeals for the circuit in which such worker or group is located or in the United States Court of Appeals for the District of Columbia Circuit. The clerk of such court shall send a copy of such petition to the Secretary. Upon receiving such petition, the Secretary shall promptly certify and file in such court the record on which he based such determination.

(b) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(c) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.